BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERRY L. WEST Claimant VS. **SEDGWICK COUNTY** Respondent AND **SELF-INSURED** Insurance Carrier	)	Docket No. **231,498**

ORDER

Respondent appealed Administrative Law Judge John D. Clark's Award dated January 25, 2001. The Board heard oral argument on July 13, 2001, in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Robert R. Lee of Wichita, Kansas. The self-insured respondent appeared by its attorney, E. L. Lee Kinch of Wichita, Kansas.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is an appeal from the Administrative Law Judge's determination that Terry L. West sustained a 15 percent permanent partial impairment of function to the body as a whole as a result of a work-related accident on December 1, 1997.

The sole issue raised on review by the respondent is the nature and extent of claimant's disability. In addition, the respondent specifically contends that it is entitled to

a reduction of the award by the amount of preexisting functional impairment pursuant to K.S.A. 44-501(c).

Conversely, the claimant contends the Administrative Law Judge's decision should be affirmed.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a part-time paramedic for respondent in December 1995 and he became a full-time employee in February 1996. Claimant's job duties included cleaning the post where he was stationed, cleaning the trucks, and caring for patients being transported to the hospital.

Claimant testified that he initially injured his back when he slipped on icy steps while bringing a cot into a house.[1] He informed his supervisor of the incident but thought his back would get better. He did not miss any work after this injury, but when there was no improvement he sought chiropractic treatment in January 1996. He only sought chiropractic treatment on that one occasion.

Claimant hurt his back lifting an appliance at home on March 25, 1996, and he sought treatment with his private physician, Dr. VinZant, on April 2, 1996. Dr. VinZant referred claimant to NovaCare for physical therapy. At NovaCare, claimant gave a history of a slip on icy steps on January 3, 1996, and the subsequent incident on March 25, 1996, when he twisted his back moving a washer.

Claimant testified that he remembered going to NovaCare but explained that the injury on January 3, 1996, was the same one he described as slipping on the icy steps while retrieving the cot from the ambulance. Claimant noted that at the time his primary concern was getting treatment and he did not remember the exact date when he fell on the icy steps.

Claimant testified that on or about December 1997, his back popped while he and a co-worker were lifting a grossly obese bedridden patient. Claimant advised his

[1]Claimant testified that this incident occurred in November 1995, however, he was not employed until the following month. Throughout the record, claimant and counsel repeatedly confuse the dates of injury and refer to the November 1995 incident and the December 1997 incident when it appears there was a December 1995 incident and a November 1997 incident. In any event, the description of how the injuries occurred is consistent throughout the record and the contemporaneous medical histories generally indicate the accidents occurred in December 1995 and November 1997.

supervisor of the incident and self treated with ice or heating pads until he sought treatment with Dr. VinZant. It should be noted that the description of this second incident is identical in all the reports. On cross-examination the claimant agreed that based upon Dr. VinZant's office note of November 18, 1997, the second incident occurred a week earlier or approximately November 11, 1997. Dr. VinZant's note of that visit indicated claimant saw him for a recheck of his back and noted claimant had hurt his back again while moving a patient. Dr. VinZant referred claimant for physical therapy.

Although claimant did not fill out an accident report while employed by respondent, he reported the injury to his supervisor and discussed the incident. Claimant was terminated on February 24, 1998, and he then notified the respondent's director and assistant director that he was being treated by his personal physician for the work-related injury to his back. Claimant requested that treatment be provided under workers compensation because he would no longer have insurance coverage since he was terminated.

Following a preliminary hearing, claimant received treatment from Dr. Drazek. The doctor authorized a Tens unit and physical therapy.

Claimant was subsequently examined by Philip Roderick Mills, M. D. at the request of respondent's counsel. Dr. Mills diagnosed bulging discopathy. Dr. Mills opined claimant had a 10 percent whole body functional impairment based on DRE Category III of which 5 percent preexisted the November 1997 injury. Dr. Mills testified the preexisting 5 percent resulted from the December 1995 injury and estimated claimant sustained an additional 5 percent due to the November 1997 injury.

Claimant, at his counsel's request, was examined by Pedro A. Murati, M.D. Dr. Murati diagnosed low back pain secondary to probable two level disk disease with radicular complaints. Dr. Murati testified that both the December 1995 and the November 1997 injuries contributed to claimant's current condition. Dr. Murati opined that the most significant injury occurred in 1997 but concluded that each injury contributed 50 percent to claimant's current condition. Dr. Murati opined claimant had a 20 percent whole body functional impairment based on the Fourth Edition of the AMA *Guides*. However, on cross-examination Dr. Murati amended that opinion to a 21 percent impairment.

The Administrative Law Judge concluded that the opinions of Drs. Mills and Murati be accorded equal weight and determined claimant has a 15 percent functional impairment to the whole body.

CONCLUSIONS OF LAW

Initially, it must be noted that throughout the record there are discrepancies regarding the dates of injury. Claimant repeatedly testified that he did not remember the

specific dates that either incident occurred. In addition, the accident report filled out by claimant included question marks where he filled in December 1997 as the date of the second incident. Nonetheless, a comparison of claimant's testimony with the history given doctors contemporaneously with his treatment reveals that the initial incident where claimant slipped on icy steps occurred in December 1995 and the incident where he hurt his back lifting the obese patient occurred in November 1997. Dr. VinZant's notes from his examination of claimant on November 18, 1997, specifically indicate the lifting incident occurred the prior week. Accordingly, the date of accident alleged as December 1, 1997, is found to have occurred on November 11, 1997.

Respondent contends that Dr. Mills' testimony that claimant sustained a 5 percent functional impairment due to the work-related injury in 1997 should be adopted. In the alternative, respondent argues that the maximum claimant should be awarded would be a split (5 percent and 10.5 percent) of the doctor's opinions. Respondent argues that both doctors apportioned claimant's impairment equally between the first incident in 1995 and the second incident in 1997.

Conversely, claimant contends that the Administrative Law Judge's decision that respondent had failed to establish any preexisting impairment should be adopted.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[2]

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA *Guides* cannot serve as a basis to reduce an award under the above statute.

A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and

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[2] K.S.A. 1998 Supp. 44-501(c).

treatment must then be the basis of the impairment rating using the appropriate edition of the AMA *Guides*.

Herein, the claimant had received treatment which primarily consisted of physical therapy following the initial slip and fall on the icy steps. The evidence of claimant's physical condition during the time between the two incidents is contained in the history section of Drs. Mills' and Murati's reports. It is significant to note that the history was provided to the doctors by the claimant. Dr. Mills' report notes that following physical therapy for the initial injury the claimant still had difficulties. Dr. Murati's report notes that following physical therapy for the first injury the claimant noted the pain did not totally resolve and it waxed and waned but was worse in the mornings and evenings.

Because the claimant's condition did not completely resolve after the initial slip and fall incident, both doctors concluded that claimant had a preexisting impairment related to that accident. As previously noted, Dr. Mills specifically determined that following the initial slip and fall incident the claimant had a 5 percent permanent partial functional impairment. Dr. Mills concluded that after the second injury, lifting the obese patient, the claimant had a 10 percent permanent partial functional impairment of which 5 percent was preexisting based on DRE Category III of the Fourth Edition of the AMA *Guides*.

Dr. Murati initially rated the claimant with a 20 percent permanent partial functional impairment based on the Fourth Edition of the AMA *Guides* but noted that he would give the claimant 10 percent for the first injury and 10 percent for the second injury.

The Administrative Law Judge concluded that the decision in *Hanson v. Logan USD 326*, 28 Kan. App.2d 92, 11 P.3d 1184 (2001), was controlling and respondent had not met its burden to establish a preexisting functional impairment. In *Hanson*, the Court noted that there was no evidence of the amount of preexisting disability and there was some evidence that Hanson had no impairment because he had not sought treatment nor were his activities restricted after his initial injury to his knee.

Herein, the facts are similar in that claimant sought only minimal treatment following his initial slip and fall injury and his work activities were not restricted by a physician. However, unlike *Hanson*, in this case there is specific evidence of the percentage of preexisting impairment. Both Drs. Mills and Murati specifically noted that claimant had a specific percentage of impairment because of the initial slip and fall incident. The doctors' opinions were based upon the history provided by the claimant of continuing physical problems following that incident. Accordingly, the Board concludes that this case is factually distinguishable from the *Hanson* decision because there is specific evidence of the percentage of preexisting impairment.

It is the Board's determination that respondent has met its burden of proof to establish claimant had a preexisting impairment prior to the work-related accidental injury

the claimant sustained while lifting the obese patient. Dr. Mills rated the claimant with a 10 percent impairment of which 5 percent was preexisting. Dr. Murati rated the claimant with a 20 percent impairment of which 10 percent was preexisting. As noted, during cross-examination, Dr. Murati increased his rating to 21 percent and again noted that half of that amount would be attributable to the preexisting impairment. According equal weight to the physicians' opinions, the Board concludes claimant has a 15.5 percent permanent partial functional impairment.

Because both doctors attributed half of their ratings to the preexisting impairment, the Board further concludes respondent is entitled to reduce the functional impairment amount by the 7.75 percent determined to be preexisting. Accordingly, the claimant is entitled to an award based upon a 7.75 percent permanent partial functional impairment to the whole body.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 25, 2001, is hereby modified to reflect the claimant has sustained accidental injury arising out of and in the course of his employment on November 11, 1997.

The claimant is entitled to 32.16 weeks at $351 per week or $11,288.16 for a 7.75 percent permanent partial general bodily disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 31st day of August 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
E. L. Lee Kinch, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Workers Compensation Director